IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-185

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION

et. al., Petitioners

v.

JAMES M. NAMEN, et al., AND THE CITY OF POLSON, MONTANA,

Respondents

MOTION OF THE LUMMI INDIAN TRIBE AND THE QUINAULT INDIAN NATION FOR LEAVE TO FILE STATEMENT AMICI IN SUPPORT OF PETITION OF CONFEDERATED SALISH AND KOOTENAI TRIBES FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

AND

STATEMENT OF THE LUMMI INDIAN TRIBE AND THE QUINAULT INDIAN NATION IN SUPPORT OF PETITION OF CONFEDERATED SALISH AND KOOTENAI TRIBES FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Office and Post Office Address:

DANIEL A. RAAS
2616 Kwina Rd.
Bellingham, Wa. 98225

Counsel for Amici

MICHAEL TAYLOR
P.O. Box 1118
Taholah, Wa. 98562

MOTION

The Lummi Indian Tribe and the Quinault Indian Nation, both of the State of Washington, move this Court for leave to participate as amici curiae in support of the Petition for Certiorari. Counsel for amici have consulted with counsel for the Confederated Tribes of the Colville Reservation so as not to duplicate argument. The decision below seriously threatens the reserved Treaty rights of amici in the exclusive use and occupation of their tribal trust lands.

STATEMENT OF INTEREST OF AMICI

Identification of Amici

The Lummi Indian Tribe is the government of the Lummi Indian Reservation located in Whatcom County, Washington, and governs pursuant to a Constitution and Bylaws approved by the Secretary of the Interior. The Lummi Reservation includes approximately 12,500 acres, of which some 7,900 acres are still held by the United States in trust for the Lummi Tribe and individual Indians. The Reservation was entirely allotted pursuant to the Treaty of Point Elliott, 12 Stat. 927.

The Quinault Indian Nation is the government of the Quinault Indian Reservation located in Grays Harbor and Jefferson Counties, Washington, and governs pursuant to Bylaws originally adopted in 1922. The Quinault Reservation includes approximately 150,000 acres still held in trust by the United States for the Quinault Nation and individual Indians. The Reservation was entirely allotted pursuant to the Treaty with the Quinault, 12 Stat. 971.

The Point Elliott and Quinault Treaties, like the Hell-Gate Treaty with the Petitioner Tribes, are all treaties negotiated and drafted by Colonel Isaac Stevens, and are all substantially similar.

The Lummi Reservation includes some 5,000 acres of tribally owned tidelands, bordered by some 30,350 front feet (775 acres) of mostly non-Indian owned shoreline. The tidelands support an active oyster farm and fish rearing facility which is supported by several million dollars of Federal funds.

Two navigable rivers whose banks are owned partially in trust and partially in fee flow through the Lummi Reservation.

The Quinault Reservation includes the entirety of Lake Quinault, some 10,000 acres, and portions of four possibly navigable rivers. The Quinault Nation operates a dock and fish rearing facility upon the lake, together with a laboratory and research station on trust land riparian to the lake. For many years the Quinault Nation has regulated and licensed all fishing, boating and wharfage on Lake Quinault even though such activity orginiates on lakeshore property outside the Reservation. The Quinault Nation has regulated fishing in the rivers and estuaries of the reservation from pre-white contact times.

ARGUMENTS OF AMICI

Amici here raise two issues not discussed in either the Petition or the Motion of the Colville Tribes: (1) the exclusive use and occupation of the reservation reserved by amici in the Point Elliott and Quinault Treaties and (2) the increased litigation which will arise as the Indian Tribes on the over 150 reservations within the jurisdiction of the Ninth Circuit attempt to distinguish the factual situation on their reservations from the facts of this case.

The Decision Below Threatens Reserved Treaty Rights to Indian Trust Lands

1. Treaties with the Indian Tribes are to be considered abrogated only in the face of explicit language in Congressional enactments. Menominee Tribe v. United States, 391 U.S. 404 (1968). Amici, in Article II of the Point Elliott Treaty, and Article II of the Quinault Treaty, reserved the exclusive use of their reservation to signatory tribes, as did Petitioner Tribes in Article II of the Hell-Gate Treaty. The court below recognized that neither the Hell-Gate Treaty nor the General Allotment Act, 24 Stat. 388, 25 U.S.C. §§331 et seq., included the grant of riparian rights on reservation waters to any non-Indian, but went on to hold that such riparian rights as wharfage (and presumably piscary) were implied by Federal common law together with the later advertising of the Department of the Interior in its sales of surplus lands on the Flathead Reservation. Neither the Court of Appeals nor the Trial Court considered the status of the Reservation as lands reserved by the tribes for their exclusive use and occupation. See United States v. Winans, 198 U.S. 371 (1905). The reservation of exclusive

use and occupation includes the right of a tribe to impose terms upon which permission to enter or reside may be granted, including licensing and taxation. Morris v. Hitchcock, 194 U.S. 384 (1903).

The exclusivity of use and occupancy of Indian reservations, although to some extent modified by modern circumstances, was nonetheless upheld last year by the Ninth Circuit. United States v. Washington, 520 F. 2d 676 (1975), cert. den. -U.S. --46 L. Ed. 2d 269 (1976). Therein, the court confirmed that an exclusive right of fishing within the reservation was reserved by the Treaty Tribes (not by or for individuals or their successors) and had been explicitly bargained for and reserved in the Point Elliott and Quinault Treaties. The decision of the Ninth Circuit in the present case would abrogate identical treaty provisions by implying that a non-Indian riparian owner of reservation shorelands has wharfage rights allowing conversion of the tribally reserved lake to his own exclusive use. Implementation of the decision would allow non-Indian shoreline owners to circumvent the rights reserved in the Treaties and exclude amici from tribal lands and waters which the Indian Tribes and the United State agreed were to be retained exclusively by the Tribes.

The Decision Below Will Lead to Increased Litigation

2. The Ninth Circuit's use of a balancing-of-the-equities test, recently rejected by this Court in Cappaert v. United States, -U.S.-, 48 L. Ed. 2d 523 (1976), opens the door to a deluge of suits as tribes and non-Indians attempt to clarify rights upon each reservation. The balancing test requires careful examination of the facts of each case. These facts include not only the relevant treaties, statutes, executive order, allotment acts, and advertisements of the developer, whether Federal or private, but also the length of time which the non-Indian development has encroached. This will inevitably lead to litigation invloving every body of water on every reservation within the United States. Were this not sufficient to clog the court calendars, each body of water might well engender multiple actions. For example, the shores of Lake Quinault include land of four different characters: homestead land; land privately owned through homestead within the Olympic National Park[1]; allienated and trust allotments; and homestead land now within the Olympic National Forest.

Because the United States holds legal title to tribal lands and waters, United States Attorneys can expect a series of requests from tribes seeking to protect their rights by bringing suit to distinguish the decision below from the situation on their own reservation. The result might not only be separate suits brought by the tribes and the United States,[2] but also adjudications in actions brought solely by tribes which do not result in a final decision: the government is not bound unless it is a party, Skokomish Tribe v. France, 269 F. 2d 555 (9th Cir. 1959), and it cannot be involuntarily joined as a party. 28 U.S.C. § 2409 (a).

1. Or the Quinault Reservation. The Quinaeilt Indians, 102 Ct.Cl. 882 (1945).

2. See 25 U.S.C. § 175, and 28 U.S.C. § 1362.

CONCLUSION

For the foregoing reasons, amici urge that the Petition for Certiorari should be granted.

DANIEL A. RAAS
2616 Kwina Rd.
Bellingham, Wa. 98225

MICHAEL TAYLOR
P.O. Box 1118
Taholah, Wa. 98587

Councel for amici

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